

1 IN THE FAMILY COURT OF PUTNAM COUNTY, WEST VIRGINIA  
2 IN RE: THE MARRIAGE AND CHILDREN OF:

2006 NOV -9 AM 11:13

3 DAWN SOULSBY,

FILED  
DONALD S. WRIGHT, CLERK  
PUTNAM CO. CIRCUIT COURT

4 Petitioner,

5 V.

Family Court No. 00-D-402  
JUDGE WATKINS

6 DAVID SOULSBY,

7 Respondent.  
8

9 FINAL ORDER FROM JUNE 23, 2006. HEARING

10 Came this 23<sup>rd</sup> day of June, 2006, the Respondent, DAVID SOULSBY, in person and by  
11 counsel, Rosalee Juba-Plumley, and came also the Petitioner, DAWN MARTINEZ, in person, and  
12 by counsel, Patrick Cottrell, before the Honorable William Watkins, Judge, for final hearing on all  
13 issues outstanding from the various contempt and modification petitions that have been filed since  
14 March, 2005, when Respondent filed the initial contempt petition concerning visitation issues with  
15 the children.

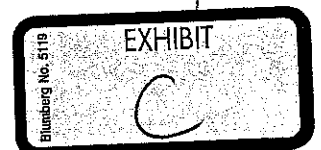
16 Whereupon, the Court heard the testimony and statements from the parties and their  
17 respective counsel, reviewed the pleadings and record, and reviewed the recommendations of the  
18 Court appointed psychologist, Dr. Stephen O'Keefe.

19 Based upon all of which, the Court hereby FINDS and ORDERS as follows:

- 20 1. That the Petitioner resides at 1024 Glen Road, Charleston, WV 25304; and the  
21 Respondent resides at 138 Leslie Place, Scott Depot, WV, 25560.  
22 2. That all issues concerning the calculation of child support, including a decision about  
23 attribution of income to the Petitioner, shall be the subject of a separate child support  
24 order that will be prepared by this Court.  
25

26 Medical Issues

- 27 3. ~~That Respondent is entitled to reimbursement for a growth hormone provided~~  
28 ~~through his office during the temporary phase and under the temporary order of the~~  
~~parties' initial divorce proceeding. Respondent is likewise entitled to reimbursement~~



1 ~~for the insurance premium reimbursement check mistakenly sent to and cashed by~~  
2 ~~the Petitioner. Respondent shall provide specific documentation of the costs for the~~  
3 ~~hormone to the Petitioner, who shall have 30 days to object to or reimburse the costs~~  
4 ~~of this medicine.~~ *WMA*

5 4. That medical decisions for the children shall be as follows:

6 (a) In emergency situations, the parent exercising parenting responsibility at the  
7 time of the emergency may seek immediate medical treatment, but, they shall  
8 advise the other parent as soon as possible of the medical emergency.

9 (b) If a procedure is an elective procedure, before the custodial parent may  
10 schedule said procedure, it must be shown to be medically necessary and,  
11 the non-residential parent must have full disclosure and a reasonable time  
12 within which to lodge an objection. If an objection is lodged, the issue shall  
13 be mediated before said procedure is scheduled.

14 5. That the primary residential parent may choose the orthodontist. The non-primary  
15 residential parent is entitled to a second opinion on any orthodontia issue at their  
16 expense.

17 6. That in all medical, dental or optical needs, the primary residential parent has an  
18 obligation to make sure that any medical provider chosen is within the medical  
19 insurance plan.

20  
21 **Whole Life Plan**

22 7. That the Respondent was NOT ordered to continue paying for the whole life  
23 insurance policy/plan in the final order or property settlement agreement and is NOT  
24 obligated to continue paying for the same from this day forward.

25 8. That said trust be dissolved and distributed as follows:

26 (a) That each party shall have 50% of the value of said whole life plan accrued  
27 during the marriage. The Respondent shall take 100% of the premiums paid  
28 and any accrued value accruing after August 1, 2002.

(b) By the agreement these funds shall be used to start an educational account for

1 Devin.

2  
3 \$500 Monthly College Stipend

4 9. (a) That Respondent is obligated under the final order and property agreement  
5 to provide \$500 per month, twelve months of the year, to each child who is  
6 in college. Respondent shall make an electronic transfer at the same time  
7 every month for said child. The Respondent may choose which day upon  
8 which to make this transfer, but, it shall be the same day each month.

9 (b) There is, of course, implied in this obligation a corresponding responsibility  
10 for the child to be enrolled during the main school year as a full time student  
11 and making reasonable progress towards a degree.  
12

13 Parenting Plan Issues

14 10. That the Respondent's concerns about alienation and the Petitioner's safety concerns  
15 over the domestic violence resulted in the numerous petitions and counter petitions  
16 filed in this matter. Recognizing both parties arguments, the Court nevertheless feels  
17 it is time to move forward and implement Dr. O'Keefe's suggestions for the future  
18 parenting of the two infant children. With respect to parenting, the Court FINDS and  
19 ORDERS as follows:

20 (a) That although there was no allegation of unfitness made against the Petitioner  
21 Mother, none is needed for a modification of parenting. Indeed, all that is  
22 required is proof that there has been a change of circumstances. Once a  
23 change in circumstances has been established, the Court then must decide  
24 what parenting plan would be in the best interests of the children. Such a  
25 change of circumstances has been shown in this instance.

26 (b) That the Petitioner Mother has traditionally been a stay-at-home Mother, and  
27 the Respondent Father traditionally has been the bread winner as an  
28 orthopedic surgeon..

(c) Pursuant to the recommendations of Dr. O'Keefe, the Respondent is willing

1 to modify his schedule and to take on more responsibility to accommodate  
2 more parenting time with his children and that Devin needs that time from his  
3 Father.

4 (d) With respect to Kari, the Court finds that Kari is of an age to nominate her  
5 guardian and chooses to reside with her Mother. Additionally, Kari is of an  
6 age to set her parenting schedule with her Father. The Court will not  
7 mandate that Kari be in counseling at this time, however, the Court cautions  
8 the parties that Kari may need to be in counseling to deal with the issues  
9 caused by this divorce and to work on her relationship with her Father. All  
10 accommodations need to be made to facilitate this counseling. As always, the  
11 Court is available to speak with Kari if either party requests such an  
12 interview.

13 (e) With respect to Devin the Court finds:

14 (i) Stability is the primary concern of this Court.

15 (ii) Both parents are fit.

16 (iii) That there is a general inability for the parties to cooperate or get  
17 along, therefore, the Court must remove as many sources of friction  
18 as possible.

19 (iv) That in the interests of stability the Court believes that Devin has  
20 made adjustments to his new school and he should stay at Sacred  
21 Heart.

22 (v) That Devin and Kari basically have many of the same activities,  
23 therefore, there would be more continuity and more stability for the  
24 family unit and for Devin for the Mother to continue monitoring and  
25 transporting to these activities.

26 (vi) That the Court agrees with Dr. O'Keefe that Devin needs more time  
27 with his Father.

28 (f) Based upon the foregoing findings on Devin, the Court ORDERS the  
following parenting plan:

1 (i) Respondent shall have parenting time with Devin every weekend  
2 except for the 3<sup>rd</sup> weekend of each month during the school year from  
3 Friday after school until Monday morning. The third weekend shall  
4 be defined as that weekend where Friday begins on the 15<sup>th</sup> through  
5 the 21<sup>st</sup> of the month. The Respondent, or his designee, shall pick  
6 Devin up from school on Friday and shall transport Devin to school  
7 on Monday morning.

8 (ii) During the Summer vacation period, the Respondent shall provide  
9 Devin's primary residence after his swim team obligations are  
10 complete. Completion is deemed by this Court to be the "City Meet".  
11 Therefore, if Devin is on a Summer swim team, the Respondent shall  
12 get the same weekend parenting time until after the "City Meet".  
13 After the conclusion of the City Meet, Devin shall primarily reside  
14 with his Respondent Father and the Petitioner Mother shall receive  
15 parenting time every weekend except for the 3<sup>rd</sup> weekend from Friday  
16 afternoon until Monday morning. Again, the weekend shall be  
17 defined as that weekend where Friday begins on the 15<sup>th</sup> through the  
18 21<sup>st</sup> of the month.

19 (iii) The Respondent shall be allowed to schedule a two (2) week vacation  
20 during his Summer parenting time during which the Petitioner shall  
21 not receive her weekend parenting time.

22 (iv) The Petitioner shall pick Devin up at his Father's residence the  
23 weekend before school starts.

24 (v) With respect to Christmas the Court finds that each parent shall have  
25 a portion of this holiday as follows: One parent shall have Devin from  
26 the day school is out until noon on Christmas Day. The other parent  
27 shall have Devin from noon on Christmas until he goes back to  
28 school. The parties shall flip a coin to determine who gets which days  
this year. Thereafter, they will alternate.

1 (vi) The Court will NOT change any other holiday.

2 (vii) Although transportation should not be an issue for regular weekend  
3 parenting time during the school year when the Respondent will be  
4 picking Devin up from school and delivering him to school on  
5 Monday, during the Summer and during the holiday parenting time,  
6 the Petitioner shall pick up and deliver Devin from his Father's  
7 residence for her parenting time during the Summer.

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9 **Contempt Issues**

10 11. Both parties have requested attorneys fees and costs primarily based on their  
11 allegations of contempt against one another and then Petitioner's assertion that she  
12 is not able to afford attorneys fees. The Court denies all of the requests, findings as  
13 follows:

14 (a) Petitioner has assets worth over \$1,000,000.00. Therefore, she has the  
15 financial ability to pay her own attorneys fees.

16 (b) The Court is not prepared to find that either party acted contumaciously in  
17 this matter.  
18

19 **Miscellaneous**

20 12. That the parties must learn to communicate and cooperate with respect to the child  
21 issues. The parties are advised that the Court is prepared to appoint a parent  
22 coordinator if they fail to resolve future issues without involving the Court.

23 13. That the Clerk shall send a certified copy of this Order to all counsel of record:  
24 Rosalee Juba-Plumley, P. O. Box 380, Eleanor, WV 25070; Patrick Cottrell, 100  
25 Capitol Street, Suite 712, Charleston, WV 25301.

26 **This is a final order which any party may appeal. An appeal of this order must be filed**  
27 **in the Circuit Clerk's office of this county. A party to this order may appeal to the Circuit**  
28 **Court if an appeal is filed within 30 days of the date of entry of this final order. If both parties**  
**file a notice of a waiver and appeal to the Supreme Court within 14 days of the date of entry**


1 of this order, the parties may appeal directly to the Supreme Court. If only one party timely  
2 files a notice of waiver and appeal to the Supreme Court, that appeal will be treated as a  
3 petition for appeal to the Circuit Court.

4 DATED this 8<sup>th</sup> day of November, 2006.

5  
6   
WILLIAM WATKINS, JUDGE

7 PRESENTED BY:

8 The Court reviewed  
9 the objections of  
10 the petitioners before  
11 signing this Order.  
12 WSW

13   
14 ROSALEE JUBA-PLUMLEY  
15 WWSB # 1938  
16 Post Office Box 380  
17 Eleanor, West Virginia 25070-0380  
18 (304) 586-1123

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126 13-19  
11-14-06  
C.C. Cottrell, Plumley

16)

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

In Re: the Marriage of      2007 JAN 16 AM 11:01

Dawn Soulsby (Martinez),  
Petitioner/ Respondent,

RONALD L. WRIGHT, CLERK  
PUTNAM COUNTY CIRCUIT COURT

v.

Civil Action No. 00-D-402  
O.C. Spaulding, Judge

David Soulsby,  
Respondent/ Petitioner.

ORDER REFUSING PETITIONER'S APPEAL

This matter came before the Court this day, pursuant to a *Petition for Appeal* from the Family Court Final Order, filed by David Soulsby,<sup>1</sup> by and through counsel, Rosalee Juba-Plumley.

The *Petition for Appeal* was filed pursuant to West Virginia Code § 51-2A-11 (2006), appealing two Family Court orders entered on the 8<sup>th</sup> day and the 21<sup>st</sup> day of November, 2006. The Respondent has not filed a response to the Petitioner's appeal. This Court's review of the *Petition for Appeal* is made pursuant to West Virginia Code § 51-2A-14 (2006).

After review of the record, including the *Petition for Appeal*, the Family Court's orders, hearing transcripts, and all relevant legal precedent, this Court finds that:

1. The Petitioner's first ground of appeal alleges that in a November 8, 2006 Order, the Family Court "erred in failing to grant David Soulsby reimbursement for growth hormone and insurance check"[sic]. To support this ground the Petitioner avers that "the hormone was deemed medically necessary and done by agreement of the parties. Under both

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<sup>1</sup> Hereinafter referred to as the Petitioner.





the temporary order and the final, Respondent, Dawn Soulsby, owes either the entire amount or 20%."

2. In the June 23, 2006 hearing, the Respondent maintained she received no documentation concerning the growth hormone or insurance check. See Hearing Transcript of June 23, 2006, at 10:32 a.m. - 10:35 a.m. The 'Final Order from June 23, 2006 Hearing' evidences that the Family Court considered, but did not adopt, the Petitioner's request for payment for growth hormone or an insurance check. Specifically, it appears the Family Court rejected the contention by striking over a portion of the Order that granted the Petitioner payment for growth hormone and an insurance check. Moreover, the Family Judge noted his consideration by handwriting "the Court reviewed the objections of the Petitioner before signing this Order" on the document.<sup>2</sup>
3. As a second ground of appeal the Petitioner claims that in a November 8, 2006, Order, the Family Court "erred in failing to grant Petitioner at least 50% of parenting time with Devin [the parties son] and in failing to switch primary residences for said child." To support this ground, the Petitioner relies upon a June 2006 letter from Dr. Stephen O'Keefe which stated that "Devin ... wanted to live with his father" and more time with the father is in the child's best interest. The Family Court granted the Petitioner additional parenting time with the child.
4. A Court may consider opinions of both parties and experts when

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<sup>2</sup> Both the 'strike over' and the handwriting were initialed WMW, presumably the initials of the Honorable William M. Watkins. The Order was prepared by the Petitioner. See Hearing Transcript of June 23, 2006, at 12:27:26 p.m.

determine the best interest of a child. However, the ultimate finding of the best interest of a child is an independent judicial determination. See generally *State Ex. Rel. Jeanne U. v. Canaday*, 210 W.Va. 88, 96, 554 S.E.2d 121, 129 (2001). The Family Court's November 8, 2006 Order specifically addressed Devin's best interest. The Family Court recognized the need of continuity and stability in a child's life when reaching its placement decision.

5. The above parties have two children born of their marriage. The Respondent, Dawn Soulsby (Martinez), has primary caretaking responsibility of their daughter, Kari, and the parties have extended shared parenting for their son, Devin. The record indicates that in the August 8, 2006 '*Order on Child Support*,' the Petitioner was ordered to pay five thousand five hundred and seventy-nine dollars (\$5579) per month in child support. This amount is the sum of two calculations performed by the Family Court. The first calculation, for daughter Kari, came from the 'worksheet for calculating basic support obligation in basic shared parenting cases' provided by W.Va. Code § 48-13-403. The second calculation, for their son Devin, came from the 'extended shared parenting worksheet' provided by W.Va. Code § 48-13-502.
6. The final ground for appeal asserts that in a November 21, 2006 *Child Support Order*, the Family Court erred in refusing to recalculate child support using two calculations with both children being considered on each formula. The Petitioner maintains that "[w]hen running the calculation, the Court ran two separate calculations treating the parties

as if they had only one child under different parenting scenarios.” It is argued that even if the mother had sole custody of both children, the child support amount would be less.

7. The record indicates that the Petitioner filed a “Motion for Reconsideration of Child Support Due to Mistake in Calculations” on or about November 21, 2006. Thereafter, the Family Court entered an order finding that “the Court’s calculations of child support as set forth in the Order are correct.” West Virginia Code § 48-13-203 (2006) instructs that “[t]he amount of support resulting from the application of the [child support] guidelines is presumed to be the correct amount, unless the court, in a written finding or a specific finding on the record, disregards the guidelines or adjusts the award as provided for in section 13-702.” Section 13-702 recognizes that if a Family Court finds the guidelines inappropriate it *may* disregard or adjust the guidelines.
8. Pursuant to W.Va. Code § 51-2A-14(b), when ruling on a *Petition for Appeal*, this Court may *only consider* the record made before the Family Court Judge. This Court may not consider any information not presented before the Family Court.
9. The Petitioner has failed to cite any law, authority, or findings which show that the Family Court committed any errors of law.
10. The Family Court’s findings of fact are reviewed under a clearly erroneous standard. W.Va. Code §51-2A-14(b). A finding is clearly erroneous when:

... although there is evidence to support the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

11. This Court must affirm the Family Court's findings of fact if they are plausible in light of the record. This Court **FINDS** the Family Court committed no error in fact finding. The Petitioner has presented no ground or supporting fact that leaves this court with a definite conviction that an error has been committed.
12. The Family Court's application of law to facts is reviewed under an abuse of discretion standard. W.Va. Code § 51-2A-14(b). The Family Court has abused its discretion if:
  - a material factor deserving significant weight is ignored, when an improper factor is relied upon, or
  - when all proper or no improper factors are assessed but the [Family Court Judge] makes a serious mistake in weighing them.
13. Abuse of discretion is a highly deferential standard and this Court **FINDS** that there has been no abuse of discretion in this matter.

When considering Family Court appeals, this Court functions as an appellate court. There is no indication that the Family Court committed reversible error by failing to grant the Petitioner reimbursement for growth hormone or an insurance check. Likewise, this Court finds no indication that reversible error was committed in

the Family Court's determinations of Devin's best interest or child support payments. In accordance with these findings, this Court **REFUSES TO CONSIDER** the Petitioner's appeal pursuant to W.Va. Code § 51-2A-14(a). This Court finds that this Order is a Final Order Disposing of the Appeal.


The Circuit Clerk shall send copies of this *Order Refusing Petitioner's Appeal* to all parties of record including:

Rosalee Juba-Plumley  
Post Office Box 380  
Eleanor, West Virginia 25070

Patrick Cottrell  
100 Capital Street, Suite 712  
Charleston, West Virginia 25301

Honorable William M. Watkins, III  
Family Court Judge  
3389 Winfield Road  
Winfield, West Virginia 25213

ENTERED this 12<sup>th</sup> day of January, 2007.

  
\_\_\_\_\_  
O.C. Spaulding, Judge

FILED  
CLERK  
WRIGHT

DOMESTIC  
127 509-514  
1-16-07

C.C. Rosalee, Patrick  
Watkins